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NECESSITY OF ENDING THE ECONOMIC, COMMERCIAL AND FINANCIAL EMBARGO IMPOSED BY THE UNITED STATES OF AMERICAN AGAINST CUBA

Letter dated 3 May 1995 from the Permanent Representative of Cuba to the United Nations addressed to the Secretary-General

I have the honour to transmit herewith a memorandum issued by the Ministry of Foreign Affairs of the Republic of Cuba, which contains a legal and political analysis of the implications of the so-called Cuban Liberty and Democratic Solidarity Act. This new legislation, which is an attempt to intensify and carry to extremes the economic, commercial and financial embargo imposed by the Government of the United States of America against Cuba, has recently been submitted to both Houses of the United States Congress and is currently under review.

As it is vital to inform the international community in a timely manner of the objectives of such legislation and its implications not only for Cuba but also for third countries, I should be grateful if you would have this letter and its annex circulated as a document of the General Assembly under item 27 of the preliminary list.

(Signed) Bruno RODRIGUEZ PARRILLA
Ambassador
Permanent Representative

* A/50/50.

ANNEX

[Original: English]

Memorandum

THE SO-CALLED CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT OF 1995

The United States Congress is considering new legislation to extend even further the extraterritorial reach of the United States economic blockade of Cuba. The proposed legislation's express purpose "is to strengthen international sanctions" against Cuba. In fact, there are no "international sanctions". The only sanctions which exist are the United States own unilateral economic, commercial and financial blockade that most other nations have opposed. What this legislation proposes is a new set of coercive measures which target third countries, to disrupt their trade and investment relations with Cuba and to bend these sovereign States to the will of the United States.

The proposed legislation, S. 381 and H.R. 927, the "Cuban Liberty and Democratic Solidarity Act (or 'LIBERTAD Act') of 1995", is far more extreme than even the so-called Cuban Democracy Act of 1992 (the "Torricelli law") which the international community universally has condemned as violating the sovereignty of third States as well as of Cuba and as violating freedom of trade.

At each of its last three sessions, the United Nations General Assembly has called for the repeal of the United States blockade against Cuba. Just last year, by a vote of 101 to 2, the General Assembly found the extraterritorial reach of existing United States measures to violate the Charter of the United Nations and international law (resolution 49/9 of 26 October 1994).

The legislation now pending before the United States Congress merits the serious and urgent attention of the international community. Its sponsors are Senator Jesse Helms and Representative Dan Burton, chairs respectively of the Senate and House of Representatives foreign relations committees, and the proposed legislation has the endorsement of the Senate's leadership as well. The House Subcommittee on the Western Hemisphere already has reported favourably on the legislation; Senate hearings are scheduled for May 1995.

The position of the current United States Administration towards the bill has been ambivalent. While the Administration has expressed reservations on the need for such an initiative and indicated initial objections to some of its particular features, the Assistant Secretary of State for Inter-American Affairs in his written testimony before the House Subcommittee on the Western Hemisphere on 16 March 1995 also stated "support (for) many of the objectives of the bill" and a willingness to meet with the legislation's sponsors in the belief that "most of the concerns we have identified can be resolved through consultation". Consequently, just as the "Torricelli bill" was enacted after the Administration then in office had expressed strong reservations, the possibility that the Helms/Burton bill may be ultimately enacted has to be taken as a very real one.

While we have chosen to emphasize in this memorandum those provisions of the Helms/Burton bill which implicate the sovereignty of third countries, principles of international law and freedom of trade, it is worth noting that through these same provisions and other provisions not specifically addressed here the Helms/Burton bill would take to new heights the United States continuing assault on the sovereignty of Cuba.

Indeed, not since the beginning of this century, when they occupied Cuba militarily and imposed the infamous Platt Amendment on the Cuban Constitution, would the United States so openly and so completely have sought to reduce Cuba to a colonial status.

We need only mention by way of example the provision of the bill which would exclude specifically named individuals from those whom the Cuban people might choose as its leaders even pursuant to elections whose character and form would be dictated by the United States; and the provisions formulating elaborate plans to control in detail the evolution of Cuba's economic and political institutions even after the United States had succeeded in coercing Cuba's abandonment of its present economic and political system.

Of the same piece is the provision of the Helms/Burton bill which would commit the United States to restructuring Cuba's domestic property relations by reversing the nationalization of the former Cuban elite's holdings. The Helms/Burton bill, in addition to its unprecedented authorization to bring lawsuits before United States courts in regard to those nationalizations, in section 303 would require a United States administrative agency to certify the claims of Cuban-Americans for restitution or compensation to the Secretary of State for espousal in any future dealings with Cuba.

As noted elsewhere in this memorandum, United States espousal or other support of these claims would violate international law, while at the same time would reverse the historic position of the United States on the subject - a fundamental change with very serious, far-reaching implications. The authority of every State to nationalize the property of its own nationals is a clearly established principle of international law. Furthermore, no sovereign has the right under international law to take up the claims of persons who were not its nationals at the time of the claimed injury. The United States itself has recognized these principles repeatedly, and has explicitly limited its espousal of claims accordingly. 1/

The Government of Cuba has always expressed its willingness to negotiate the claims issue with the Government of the United States. As is well known, Cuba has reached settlement through negotiations with all other countries whose nationals' properties in Cuba were nationalized.

The nationalization of Cuban-owned property, however, is not subject to settlement with other countries as it stands on an entirely different footing in international law. The Government and people of Cuba firmly reject any attempts to encroach on their sovereignty in this regard. As the President of Cuba's National Assembly stated in reference to the claims issue while addressing that body on 24 February 1995, the solution of that issue "would be complex and would require negotiations demanding patience and good will on both sides" even

without the Helms/Burton bill. "But if the problem was indeed difficult", he observed, "now it could become insolvable, because in addition to other things that are totally unacceptable, the bill for the first time introduces an element which will make impossible any attempt to seek an arrangement". That new element, he indicated, is precisely the bill's provision concerning Cuban-owned property nationalized by Cuba.

Legislation so violative of the sovereignty of any country must be viewed with grave concern. Moreover, precisely as its sponsors intend, the Helms/Burton bill would complicate immensely any effort to normalize relations between the United States and Cuba on the basis of the principles of sovereign equality of States, non-intervention and non-interference in their internal affairs.

The international community repeatedly has expressed its determination to encourage the normalization of relations between the United States and Cuba based upon strict compliance with those fundamental principles of the Charter of the United Nations and of international law. The international community therefore has good reason to be concerned with all aspects of this proposed legislation, which would further commit the United States to an entirely different course.

In the following pages we identify some of the provisions of the Helms/Burton bill more blatantly directed at third countries and their nationals.

1. Exclusion of sugar imports from countries which purchase sugar from Cuba

Section 109 of the bill would prohibit the entry into the United States of any sugars, syrups and molasses that are the product of a country that imports sugar, syrup or molasses from Cuba. It would go well beyond current United States legislation, which simply prohibits re-exports of Cuban-origin sugar to the United States through third countries. 2/ Congress has been advised by its own Congressional Research Service that the Helms/Burton provision is aimed principally although not exclusively at Brazil, Canada, China, Japan, Mexico, Sweden and Switzerland and certain European Union countries (Belgium, Luxembourg, France, Germany, Netherlands and United Kingdom of Great Britain and Northern Ireland) (Congressional Research Service, Memorandum, 13 March 1995).

The House Subcommittee amended section 109 to broaden its scope, so that additionally it would now also prohibit the importation of "products with sugar content in excess of 35 per cent" from those countries that import Cuban-origin sugar, syrups or molasses. This amendment would not only worsen the effects of the provisions for the countries mentioned above, but since there are many countries that do not export sugar except as processed and incorporated in candies, chocolates and other products, those effects could hurt an even larger number of countries.

This provision is an undisguised act of retaliation against third countries for maintaining trade relations with Cuba. In the General Assembly and through

the diplomatic protests of individual countries, virtually the entire international community has already condemned the United States for attempting to impose its Cuba policy on third countries in ways far less drastic than this provision of the Helms/Burton bill. They have asserted in the strongest possible terms that the United States must respect their sovereign decision to trade with Cuba, not seek to coerce them into bending to United States will, and must abide by principles of international law and free trade as well.

The proposed ban on third-country sugar imports would also violate the specific treaty commitments of the United States under the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA). As Congress's own Congressional Research Service has found, those international agreements obligate the United States to accept third-country imports except when limitations are necessary to protect vital national security interests. Any suggestion that Cuba threatens the national security interests of the United States has always been ludicrous and pretextual, but today even the United States has abandoned any attempt to justify its blockade against Cuba on such grounds. Since 1991, the stated goal of the United States economic blockade has been to coerce Cuba into abandoning its own economic, social and political system and adopting one more acceptable to the United States. The Helms/Burton bill expressly confirms and restates that this, rather than defence of United States national security interests, is its goal.

2. Lawsuits in United States courts against third-country nationals for trading with or investing in Cuba

The Helms/Burton bill in section 302 would allow persons who lost property in Cuba to sue third-country companies that - 36 years later - are engaged in business with Cuba in some way involving the nationalized property. For example, third-country companies which buy sugar grown on land which, three decades ago, was owned by a Cuban national, could now be sued in United States courts by the former owner of the land.

Under Helms/Burton, third-country companies could be held liable in an amount up to triple that of the value of the nationalized property which they are "selling, transferring, distributing, dispensing, or otherwise disposing of, or purchasing, receiving, possessing, obtaining control of, managing or using", according to the bill's sweeping definitions. It would not matter if the nationalization of the property in question was lawful under international law, or Cuban law or even prior United States law. The bill itself would establish the liability of third-country companies by fiat.

As is well known, the Cuban Revolution which triumphed in 1959 produced a profound transformation in property relations and in the economy of the Cuban society. The pre-Revolution concentration of wealth and ownership of productive facilities and land was extreme, as was the resulting inequality and poverty of the vast majority of the Cuban people. The Cuban people made the sovereign decision to nationalize in the public interest much of the country's productive facilities and land.

Given that, over the course of 36 years, the Cuban Revolution has built many new productive facilities and has brought into production vast tracts of previously unused land, much of the third-country investments in Cuba and much of third-country trade in Cuban commodities would be beyond the reach of the Helms/Burton provision.

None the less, owing to the extent of the nationalizations in the first years of the Revolution, the Helms/Burton bill may well expose to suits in United States courts many third-country companies which are trading with or investing in Cuba. This is particularly so as the Helms/Burton bill would permit such suits not merely by persons who were United States nationals at the time of the nationalizations but by those who were Cuban nationals at the time and only subsequently became United States nationals. The latter category far exceeds in number the former. It includes extremist but none the less influential sectors which, for ideological as well as economic reasons, will be eager to employ this new weapon in their ongoing campaign to disrupt Cuba's mutually beneficial commercial relations with third countries.

Like the provision on sugar imports, this provision of the Helms/Burton bill is a direct challenge to the sovereignty of third countries. All States with the exception of the United States have recognized the legitimacy of its nationals trading in Cuban-origin commodities and investing in Cuba, and have recognized the legitimacy of their resulting title to property. None the less the Helms/Burton bill would stipulate that the activities of these third-country nationals within the territory of their sovereignty is illegitimate and their title to property defective. Helms/Burton would displace the law of other countries with respect to property and persons within their territory and would impose United States law in its stead.

As has been universally recognized, the territorial sovereignty of a country requires that other States must accept the law of the territory where property is situated as to the legitimate ownership of that property. This same principle is also the foundation of international commercial relations, for it provides the certainty as to title in goods essential to all international trade.

Hitherto, even the United States has recognized these fundamental principles of international law. Both the United States Congress and the United States Supreme Court have rejected the possibility of the former owners of nationalized property suing in the courts of the United States except when the nationalized property has been brought within United States territory. Even then, United States law has only permitted lawsuits to recover the property or its purchase price if the former owner was a United States national at the time of the nationalization and makes the claim that the nationalization was in violation of international law regarding injury to aliens. The Helms/Burton bill ignores these constraints on United States jurisdiction required by respect for the sovereignty of other countries.

The international community has additional reasons to object to this provision of the Helms/Burton bill. Until now, even United States law has expressly recognized the right of a foreign State to nationalize the property of persons or corporations which were its nationals at the time of the

nationalization, and have given effect to such nationalizations with respect to property which subsequently came into United States territory. Third-country companies reasonably could have relied upon this historic and public United States position in investing in or otherwise dealing in Cuban properties.

For the United States to change its position now, and to punish those companies for doing what United States law formerly held was proper, would violate the United States international obligation of fairness and good faith in its relations with third countries and their nationals. Moreover, the United States Department of State itself has acknowledged that international law does not permit the United States to advance claims "for losses or damages sustained by persons who were not its citizens at the time of the loss or damage". 3/

It is very important to note that the Helms/Burton bill's provision allowing suits is not limited to claims arising out of Cuban expropriations. Rather, the bill expressly provides for lawsuits against any person or any Government that traffics in property confiscated by "a foreign Government". Many countries have found it appropriate to nationalize property over the years and some have not yet reached full settlement of compensation claims. Third-country companies that deal with those countries would be exposed to lawsuits in United States courts to the same extent as third-country companies that deal with Cuba.

3. Prohibition on the extension of credit to third-country companies that trade with or invest in Cuba

The Helms/Burton bill would retaliate against third-country companies in an additional way for trading with or investing in Cuba. It would prohibit United States financial institutions from making loans or otherwise extending credit to third-country companies whose activities in any way involve nationalized Cuban property. This prohibition would apply even when the financing is completely unrelated to the Cuba-related activities of those companies.

For example, under section 103 of the bill, a third-country company that has formed a joint venture utilizing in any way Cuban facilities nationalized 36 years ago could no longer obtain United States bank loans for its own domestic operations. Nor could it trade with its United States partners on credit, or obtain other trade financing.

United States enforcement of this provision is likely to be effective. If this measure passes, the Government of the United States will circulate a "blacklist" to United States banks and other United States financial institutions naming third-country companies that are trading with or have invested in Cuba and must, theretofore, suffer the retaliation that the bill prescribes.

This provision is objectionable for the same reasons as is the parallel provision subjecting third-country companies to lawsuits in the United States for their Cuba-related business. It seeks to force third countries and their nationals to choose between commercial relations with the United States and with Cuba. According to the Congress's own Congressional Research Service, this

provision would violate the United States treaty obligations, particularly NAFTA.

Like other aspects of the Helms/Burton bill, this provision is unprecedented. While the United States traditionally has sought to adjust its relations with countries to discourage their nationalization of United States-owned property, it has never adopted measures directed at third countries or their nationals. Nor has the United States hitherto concerned itself with the nationalization of property owned by the nationals of the nationalizing State.

Although the House Subcommittee amended section 103 in a way that in essence restates current law - which already prohibits United States persons from financing transactions involving property in which Cuba or any Cuban national has any interest - the final shape that this provision will take if the bill is approved is still to be seen.

4. Additional measures of retaliation against third-country companies for investing in or trading with Cuba

In section 301, the Helms/Burton bill would exclude from entry into the United States the officers and even shareholders of third-country companies whose Cuba-related business in any way involves nationalized Cuban property, and would even exclude the spouses and children of those persons. Aside from its arbitrary and discriminatory nature and other obvious objections, this provision conflicts with the United States treaty obligations.

In numerous bilateral commercial treaties and in NAFTA, the United States and the other contracting parties have agreed to permit each other's nationals to enter their territory to carry on trade. The only exceptions are those provided by laws regarding exclusion of aliens for purposes of protecting health, safety or national security; the Helms/Burton bill's ground for exclusion hardly qualifies under these treaty exceptions.

5. Interference with international financial institutions

In another unprecedented provision, section 104 of the Helms/Burton bill would commit the United States to withholding payments to international financial institutions such as the Inter-American Development Bank, the World Bank and the International Monetary Fund in an amount equal to any loans extended by those institutions to Cuba. This goes far beyond the current instructions, based on previous legislation, requiring United States representatives to those institutions to vote against any loans to Cuba. This too is a further effort to impose the United States unilateral blockade of Cuba upon the international community.

6. Attempted coercion of the independent States of the former Soviet Union

In section 106 (c), the Helms/Burton bill would amend existing law to require the President of the United States to terminate assistance to the independent States of the former Soviet Union in the event that they are providing "assistance for, or engaging in nonmarket based trade" with Cuba.

"Nonmarket based trade" is defined so broadly as to include many features of normal trade relations between countries, including "(A) exports to the Government of Cuba on terms that involve a grant, concessional price, guarantee, insurance, or subsidy; (B) imports from the Government of Cuba at preferential tariff rates; and (C) exchange arrangements that include advance delivery of commodities, arrangements in which the Government of Cuba is not held accountable for unfulfilled exchange contracts, and arrangements under which Cuba does not pay appropriate transportation, insurance, or fiance costs".

The provision's purpose to interfere with even normal trade relations is also evidenced from the fact that the independent States are not engaged in anything other than normal commercial relations with Cuba, as they themselves repeatedly have stated and as even the United States President has confirmed. The purpose, clearly, is to coerce the independent States to cease their conduct of normal trade with Cuba by wielding against them the threat of retaliation for such trade.

The international community as a whole has an interest in opposing a precedent so blatantly violative of third-country sovereignty and established norms of international trade.

7. Plans for still additional acts of retaliation against third countries for trading with or investing in Cuba

Not content with even the foregoing efforts to interfere with third-country economic relations with Cuba, the Helms/Burton bill would set the stage for further acts of retaliation and intimidation. In section 108, it would require the President of the United States to report to Congress on third-country "commerce" with as well as third-country "assistance" to Cuba. The President would be required to make these reports within 90 days of the bill's enactment and annually thereafter.

Section 108 specifies in great detail the contents of the reports to be filed by the President on all countries that trade with Cuba. These reports are to include, among other matters, "a description of Cuba's commerce with foreign countries, including an identification of Cuba's trading partners and the extent of such trade"; "a description of the joint ventures completed, or under consideration, by foreign nationals and business firms involving facilities in Cuba ... and the names of the parties that are involved"; and "a description of all bilateral assistance provided to Cuba by other foreign countries, including humanitarian assistance".

Such detailed reporting requirements make evident the ominous uses to which the bill's sponsors intend to put this provision, respective of perfectly normal, lawful and legitimate economic relationships that may be established in Cuba by any third country. When considered in the light of the retaliatory measures against certain third countries established in section 106 (see sect. 6 above) the provision contained in section 108 give reason for even greater concern on the part of the international community.

Notes

1/ See, for example, International Claims Settlement Act, 22 United States Code sections 1641b, 1641c, 1641d, 1642d, 1643c, 1644c and 1645c.

2/ Section 902(c), Pub. L. No. 99-198, 99 Stat. 1354, 1444 (1985), as amended by section 903, Pub. L. No. 101-624, 104 Stat. 3359, 3448 (1990), 7. U.S.C. section 1446, note.

3/ Department of State letter to Congress (15 December 1961), reprinted in 8 Whiteman, Digest of International Law 1233 (U.S. Department of State, 1967); see also, for example, Department of State memorandum to Congress, reprinted in S. Rep. No. 97-211, 97th Congress, first session 5 (1981); Department of State letter to Congress (6 February 1975), reprinted in Digest of United States Practice in International Law 484-85 (U.S. Department of State, 75); Department of State memorandum, "The matter of nationality with respect to international claims" (9 February 1959), reprinted in 8 Whiteman, Digest of International Law 1233 (U.S. Department of State, 1967); Department of State letters to naturalized citizens (26 July 1889), reprinted in VI John Bassett Moore, A Digest of International Law 631 (Government Printing Office, 1906).